No. 88-1512

FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS & MARGARET L. FERENS,
His Wife,

Petitioners,

v.

JOHN DEERE COMPANY a/k/a Deere & Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David P. Helwig, Esquire
Counsel of Record
Gary F. Sharlock, Esquire
Sharlock, Reichbeck & Mahler
1110 Two Chatham Center
Pittsburgh, PA 15219
(412) 391-6171

Attorneys for John Deere Company
Respondent

CHICAGO LAW PRINTING CO., (312) 939-4464

22 pp

TABLE OF CONTENTS

	Page
OPINIONS BELOW AND JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE UNITED STATES CONSTITUTION, AS WELL AS SOUND JURISPRUDENTIAL POLICY CONSIDERATIONS, REQUIRE THE APPLICATION OF PENNSYLVANIA'S STATUTE OF LIMITATIONS UNDER THE PARTICULAR FACTS OF THIS CASE	5
A. The Third Circuit's holding is consistent with *Van Dusen v. Barrack*	5
B. *Erie R. Co. v. Tompkins* and its constitutional bases mandate application of Pennsylvania's statute of limitations in the present matter	8
C. Encouraging the prosecution of stale claims in forums where they would be time-barred but for §1404(a) undermines the sound policy of limiting such claims	11
II. THE THIRD CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE SPECIFIC HOLDINGS OF THE CIRCUIT COURT DECISIONS UPON WHICH PETITIONERS RELY	15
III. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI	17
CONCLUSION	17

TABLE OF CITATIONS

Page

CASES

Cowan v. Ford Motor Co., 719 F.2d 785 (5th Cir. 1983) 13

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 3, 4, 8, 9

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 8

Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (5th Cir. 1969) 12

Louisiana & Mississippi R. Transfer Co. v. Long, 159 Miss. 654, 131 So. 84 (1930) 12

Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980) 15

Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983) 16

Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc., 689 F.2d 682 (11th Cir. 1982) 15

Shrubrooks v. A.C.&S., Inc., 529 So.2d 557 (Miss. 1988) 13

Sun Oil Co. v. Wortman, ___ U.S. ___, 108 S. Ct. 2117 (1988) 4, 9, 10

Van Dusen v. Barrack, 376 U.S. 612 (1964) 5, 6, 7, 9, 16

STATUTES

28 U.S.C. §1404(a) ..... *passim*

28 U.S.C. §1406(a) 16

TABLE OF CITATIONS (Cont.)

Page

Miss. Code Ann. §15-1-49 (1972) 2

Miss. Code Ann. §15-1-65 (1972) 1, 11, 13

42 Pa. Cons. Stat. §5521 (1981) 11

42 Pa. Cons. Stat. §5524(2) (1981) 2

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §142 (Supp. 1989) 14

OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the Petition, this case involves Miss. Code Ann. § 15-1-65 (1972) which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

STATEMENT OF THE CASE

On July 5, 1982, Albert J. Ferens was injured while cleaning a combine manufactured by John Deere Company. The accident occurred on petitioners' farm in Pennsylvania. Mr. and Mrs. Ferens are Pennsylvania residents. Mr. Ferens purchased the combine in Pennsylvania. On July 3, 1985, petitioners filed an action in the United States District Court for the Western District of Pennsylvania seeking damages for Mr. Ferens' injuries based on various breach of warranty theories.

On July 25, 1985, petitioners filed an action in the United States District Court for the Southern District of

Mississippi seeking damages for the injuries sustained in the July 5, 1982 accident based on theories of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. § 15-1-49 (1972). Pennsylvania's two year statute of limitations would have barred the petitioners' negligence and strict liability action had the action been filed there. 42 Pa. Cons. Stat. § 5524(2) (1981). Respondent filed an Answer to the Mississippi action which denied liability and raised the defense of statute of limitations. Prior to initiating any discovery or otherwise attempting to prosecute the action in Mississippi, petitioners filed a motion to transfer that action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was supported by an affidavit signed by Mr. Ferens which asserted, inter alia, that:

(1) The combine was purchased in Pennsylvania and continued to be located in Pennsylvania;

(2) The accident occurred in Pennsylvania;

(3) "All witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania"; and

(4) "All documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania."

Petitioners' motion was granted on November 8, 1985.

Following transfer the Mississippi action and the Pennsylvania action were consolidated on petitioners'

motion. Thereafter, respondent moved for summary judgment in both actions. The motion for summary judgment in the negligence and strict liability (Mississippi) action asserted that, under the particular facts of the case, proper implementation of 28 U.S.C. § 1404(a), as well as the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), required application of Pennsylvania's statute of limitations. The district court granted that motion, holding that to apply Mississippi's statute of limitation would be to countenance a "judicial juggling act between forums – one with a clear interest in the litigation and one whose interest is nominal at best." 639 F. Supp. 1484, 1492 (1986). The district court denied, without prejudice, respondent's motion for summary judgment as to the breach of warranty (Pennsylvania) action.

The district court granted petitioners' motion for entry of final judgment upon less than all claims pursuant to Fed. R.C.P. 54(b). On appeal a panel of the United States Court of Appeals for the Third Circuit affirmed the district court in a 2-1 decision. The majority's opinion held that granting of summary judgment was proper because application of Mississippi's statute of limitations to a cause of action having no connection with Mississippi, apart from the fortuitous circumstance that respondent did business there, violated the Due Process, and Full Faith and Credit Clauses of the United States Constitution. The court concluded, therefore, that Mississippi's statute of limitations could not constitutionally have been applied even if the action had remained in Mississippi. The majority's opinion did not dispose of respondent's contentions that the granting of summary

judgment was also correct based on the proper implementation of 28 U.S.C. § 1404(a) and based on the constitutional constraints on federal power enunciated in *Erie R. Co. v. Tompkins*.

This Court granted certiorari, and vacated and remanded in light of its opinion in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S. Ct. 2117 (1988). On remand, the Third Circuit again affirmed the district court by a 2-1 panel decision. The majority opinion stated: "Under the circumstances of this case, we hold that the transferee forum's law applies (Pennsylvania)." 862 F.2d 31, 32 (3rd Cir. 1988). Petitioners' motion for rehearing and for rehearing en banc was denied on January 5, 1989.

SUMMARY OF ARGUMENT

Van Dusen v. Barrack reserved the question of whether the transferor or transferee forum's choice-of-law provisions would be applied in the case of a plaintiff-initiated transfer pursuant to 28 U.S.C. § 1404(a). *Van Dusen's* concern that § 1404(a) would be misused as a forum-shopping device supports the Third Circuit's holding that Pennsylvania's statute of limitations should be applied under the circumstances of this case. The purpose for which petitioners have attempted to utilize § 1404(a) would result in the application of that section in a manner which is contrary to the Constitution's inherent limits on federal power and the Equal Protection Clause. This Court should not interpret § 1404(a) in a manner which encourages the filing of stale claims.

The question presented by the Petition is one of first impression. The circuit court of appeals decisions upon which petitioners rely did not address the unique factual circumstances which are involved in this case. The alleged interest which petitioners assert is not of sufficient importance to justify this Court's exercise of its powers of discretionary review.

ARGUMENT

I. THE UNITED STATES CONSTITUTION, AS WELL AS SOUND JURISPRUDENTIAL POLICY CONSIDERATIONS, REQUIRE THE APPLICATION OF PENNSYLVANIA'S STATUTE OF LIMITATIONS UNDER THE PARTICULAR FACTS OF THIS CASE.

A. The Third Circuit's holding, is consistent with *Van Dusen v. Barrack*.

As petitioners are compelled to acknowledge (albeit belatedly in their Petition), in *Van Dusen v. Barrack*, 376 U.S. 612 (1964) the Court explicitly reserved judgment on the question of whether the transferor forum's law would apply in the case of a plaintiff-initiated transfer pursuant to 28 U.S.C. § 1404(a): "[W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State.[41] We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . . ". 376 U.S. at 639-640. Footnote forty-one to the preceding passage also commented that "[w]e do not suggest that the application of transferor state law is free from constitutional limitations." *Ibid.* The multitude of issues which may arise and the varying factors to be considered in

cases not involving defendant-initiated transfers pursuant to § 1404(a) demonstrate the wisdom of the restrained approach taken in *Van Dusen*. Petitioner believes that similar caution is appropriate in the present matter and that in considering this Petition the Court should limit itself to the narrow issue which is before it.

Thus, in disposing of the Petition the Court need only consider whether the Third Circuit erred as a matter of law in holding that § 1404(a) did not mandate that the transferor forum's statute of limitations be applied where: (1) petitioners filed their tort action in Mississippi, a jurisdiction having no connection with the occurrence from which the action arose; (2) petitioners moved to transfer the action to Pennsylvania on the grounds that Pennsylvania was the forum in which all relevant facts regarding the circumstances of Mr. Ferens' accident and the injuries sustained by him could be best developed; and (3) petitioners' action would clearly have been barred by Pennsylvania's two year statute of limitations had it originally been commenced in Pennsylvania. This Court need not consider other issues such as that of which forum's law should be applied in the case of a plaintiff-initiated transfer under § 1404(a) where plaintiff's original choice of forum was improvident as well as inconvenient.

The Third Circuit's holding is supported by *Van Dusen's* concern regarding the potential use of § 1404(a) as a vehicle to allow forum-shopping: "If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument." 376 U.S. at 636. Petitioners are at pains to assert that filing of

their tort action in the Southern District of Mississippi constituted permissible, rather than proscribed, forum-shopping. Although respondent deplores the Mississippi Supreme Court's unreasonable construction of that state's borrowing statute, it concedes that petitioners were within their rights in attempting to avail themselves of Mississippi's six year statute of limitations by prosecuting their tort action there. It is a far different matter, however, for petitioners to spuriously commence this action in Mississippi and then utilize § 1404(a) as a vehicle to allow them to prosecute the action in Pennsylvania where the action would have been barred under Pennsylvania's two year statute of limitations. Under the particular facts of this case Mississippi should not be treated as the forum in which petitioner's action was filed. Therefore, the Court's comments in *Van Dusen* regarding uniformity "between the federal district court which decides the case and the courts of the State in which the action was filed" (376 U.S. at 639) should not apply to the present petition. Rather, the Court's concern in *Van Dusen* about the harmful effects which might arise as the result of the "accident" of federal diversity jurisdiction in conjunction with the use of § 1404(a), support the Third Circuit's affirmance of the district court's granting of respondent's motion for summary judgment.

In *Van Dusen* the Court observed that "The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as bonus for a change of venue.'" 376 U.S. at 635-636. Respondent respectfully submits that § 1404(a)'s legislative history also does not justify the equally startling conclusion that Congress intended to create a six year

federal statute of limitations for all common law personal injury actions where a defendant had minimum contacts with Mississippi and in which diversity jurisdiction existed. Yet the creation of such a federal statute of limitations would be precisely the effect if the Court were to embrace petitioners' arguments.

B. *Erie R. Co. v. Tompkins* and its constitutional bases mandate application of Pennsylvania's statute of limitations in the present matter.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) the Court held that there was no general federal common law and that, therefore, cases in which federal jurisdiction was predicated on diversity of citizenship were to be determined in accordance with the substantive common law of the state in which the federal court hearing the case was located. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) the Court utilized the so-called "outcome determinative" standard to hold that *Erie* required a district court to apply the statute of limitations of the state in which it was located. As this Court recently observed:

> "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of our *Erie* jurisprudence, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits. [citations omitted] The purpose of the substance-procedure dichotomy in the context of Full Faith and Credit Clause, by contrast,

> is not to establish uniformity but to delimit spheres of state legislative competence."

Wortman v. Sun Oil Co., ___U.S. ___, 108 S.Ct. at 2124 (1988).

In *Van Dusen* the Court cautioned against a "superficial" reading of *Erie*. 376 U.S. at 637. Respondent believes that the fundamental constitutional constraints which produced the holding in *Erie* compel the conclusion that application of Pennsylvania's statute of limitations was correct in the present matter. *Erie's* initial constitutional concern was that the doctrine of a general federal common law had violated the Equal Protection Clause by creating disparate results in litigation involving similarly situated parties based solely on the existence of federal diversity jurisdiction. 304 U.S. at 74-75. In the present matter such a disparate result will occur if the Court accepts petitioners' contentions. Thus, petitioners will be able to select Pennsylvania as the forum in which their lawsuit is prosecuted due solely to the fact that there is diversity of citizenship between the parties. If respondent were a Pennsylvania citizen, petitioners' only avenue of relief (other than pursuing a legal malpractice action against an attorney who may have allowed the Pennsylvania statute of limitations to lapse) would be to proceed in the state courts of Mississippi.

Moreover, probably the more significant constitutional basis for *Erie* is its view as to the Constitution's inherent limitations on federal power.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a

> statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78. These same limitations mandate rejection of the contention that plaintiffs may utilize § 1404(a) as a vehicle to allow the prosecution of state common law claims in a forum where, but for § 1404(a), those claims would be barred by the forum's statute of limitations.

This Court recently expressed a kindred view of the constitutional limitations on federal judicial power vis-a-vis the powers of the states in *Sun Oil Co. v. Wortman*, *supra*. While *Wortman* required the vacating of the Third Circuit's original order affirming the district court's granting of summary judgment in the present matter, it by no means compelled the Third Circuit to reverse the granting of summary judgment. To the contrary, although *Wortman* was principally concerned with contentions pertaining to the Full Faith and Credit Clause, its handling of those contentions clearly supports the application of Pennsylvania's statute of limitations in this matter. Thus, in *Wortman* this Court deferred to the right of a state to apply its own statute of limitations to a matter pending in its courts. The Court expressly rejected an invitation to "embark upon the enterprise of constitutionalizing choice-of-law rules". ___U.S. ___, 108 S. Ct. at 2124. Such an enterprise, had it been embarked upon, would make the federal courts the arbiters of the applicable statute of

limitations to actions brought pursuant to state law. Petitioners' contentions, if accepted, would create a comparable role for the United States Congress based upon the enactment of § 1404(a).

C. Encouraging the prosecution of stale claims in forums where they would be time-barred but for § 1404(a) undermines the sound policy of limiting such claims.

The reasons which support the enactment of statutes of limitation – judicial economy, fairness to defendants, simplification of proof, etc. – are so well-established as to require no elaboration. Similarly, the undesirability of allowing parties to shop for a forum with a longer statute of limitations when their claim is time-barred in the forum where it arose is so well-recognized that many states (including Mississippi) have adopted so-called "borrowing statutes". Typically, borrowing statutes adopt as the applicable period of limitation that which would have applied in the jurisdiction where a cause of action arose. For example, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim. 42 Pa. Cons. Stat. § 5521 (1981).

The present Petition grows out of the unreasonable construction of Mississippi's borrowing statute which has been adopted by its Supreme Court. Mississippi's statute provides:

> § 15-1-65. Action barred in another jurisdiction barred here.

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or foreign country, or of some other state or foreign country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

The logical and grammatically sound reading of the preceding statute should lead the uninitiated to conclude that the present action would be barred in Mississippi because "[w]hen a cause of action has accrued in some other state or in a foreign country, and by the law of such state or foreign country . . . an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state." The Mississippi Supreme Court, however, relying on the clause omitted from the edited version set forth in the preceding sentence and inferring a comma following "some other state or foreign country", has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84, 88 (1930). (Respondent is not a Mississippi corporation, but is treated as having been a Mississippi resident at the time of the accrual of the present action by reason of its being qualified to do business in the state at that time. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969).) Notwithstanding that the only plausible rationale for this construction of the statute is to provide employment to members of the Mississippi bar by allowing that state to serve as a dumping ground for stale claims, and despite the Fifth Circuit Court of Appeal's apparent hope that the construction would be

repudiated, the Mississippi Supreme Court adheres to its previous interpretation of Miss. Code Ann. § 15-1-65. *Cowan v. Ford Motor Co.*, 719 F.2d 785, 787 (5th Cir. 1983).

Petitioners predict direly: "The rule announced in *Ferens* will result in the congestion of cases in districts which, although proper as to venue and jurisdiction, have little relation to the underlying causes of action, which causes of action could more conveniently and efficiently be tried in other appropriate districts." (Petition, pp. 19-20). Whether the predicted congestion may occur is entirely speculative. Should it occur, however, respondent submits that the true cause of such congestion is the Mississippi Supreme Court which is apparently determined to change that state's nickname from "The Magnolia State" to "The Stale Claims State". See *Shewbrooks v. A.C.&S., Inc.*, 529 So.2d 557 (Miss. 1988). Although federal district courts in Mississippi may be the unfortunate victims of such judicial largesse, as a matter of policy it is infinitely preferable that such burdens be restricted to the courts of Mississippi rather than distributed throughout the country. If restricted to Mississippi, there may eventually come to exist such intolerable delays in resolution of actions arising in that state that the citizens of Mississippi will correct the situation either through their legislature or through judicial elections.

If this Court accepts petitioners' basic contention as to the proper interpretation of § 1404(a), the unquestionable result will be an increase in the filing of claims in Mississippi which are time-barred in the jurisdictions where they arose, swiftly followed by plaintiff's § 1404 (a) motion. It is unfortunate that other segments of our

nation's economy are not as efficient and well organized as its plaintiffs' bar. The strategy pursued by petitioners' counsel in the present matter was undoubtedly inspired by the Pennsylvania Bar Association's Civil Litigation Section's Practice Bulletin Number 7 "How to Save that Over Two Year Old Claim", subtitled "Applying the Mississippi Statute of Limitations a/k/a St. Jude". That publication urged Pennsylvania counsel handling superannuated tort claims to do exactly what was done by petitioners in the present matter. There is no doubt that all but the most backward practitioners would hear of a ruling in petitioners' favor by this Court and do precisely what petitioners have attempted to do in this matter. Considering the crushing burdens to which the federal district courts are already subject (which have of course produced calls for the elimination of diversity jurisdiction), respondent finds it inconceivable that this Court would apply § 1404(a) in a manner which would guarantee increased civil litigation – litigation which as a rule would be more difficult to handle than the normal case simply by virtue of its age.

Finally, if § 1404(a) were to be applied in the manner urged by petitioners, district courts in states other than Mississippi would be forced to adopt a choice-of-law approach which is contrary to the recently adopted revision of the RESTATEMENT (SECOND) OF CONFLICTS OF LAW, § 142 (Supp. 1989). The revision states:

> § 142. Statute of Limitations
>
> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) the forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Although in *Wortman* this Court declined to constitutionalize the views of modern scholars, respondent believes that the Court may properly consider such views in interpreting § 1404(a).

II. THE THIRD CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE SPECIFIC HOLDINGS OF THE CIRCUIT COURT DECISIONS UPON WHICH PETITIONERS RELY.

Careful review of the circuit court of appeals decisions cited by petitioners reveals that none of those cases actually decided the precise legal question presented by the present Petition. Thus, none of those cases involved a situation in which the plaintiff filed an action for the sole apparent purpose of capturing a favorable statute of limitations and then exporting it to the forum where the cause of action arose, but where it would have been time-barred if originally filed there. *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980) involved a defendant – initiated transfer, the probable basis for which was 28 U.S.C. § 1406(a), rather than § 1404(a). *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982)

presented a situation in which the district court treated the defendant's motion to dismiss for lack of personal jurisdiction and on grounds of forum non conveniens as a § 1404(a) motion. That case did not involve manipulative use of § 1404(a) by plaintiff. *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983) applied the rule that transfer pursuant to § 1406(a) required application of the transferee forum's choice-of-law rule. The Ninth Circuit did not analyze the question of which statute of limitations should be applied in the case of a plaintiff-initiated § 1404(a) transfer, but erroneously stated in *dictum* that in all cases transferred under § 1404(a) "we must apply the law of the transferor court", misciting *Van Dusen* for that proposition. 716 F.2d at 643.

Although the cases cited by petitioners do not establish the existence of a conflict among the circuit courts of appeal such as would justify the granting of the Petition, those cases' treatment of transfers under 28 U.S.C. § 1406(a) supports to the Third Circuit's holding in this case. The courts of appeal have generally held that the transferee forum's choice-of-law rules should apply following transfer pursuant to § 1406(a) because otherwise plaintiffs could utilize § 1406(a) to capture the favorable law of the transferor forum even though the original defendant was not properly subject to that forum's personal jurisdiction. The courts have correctly refused to condone such blatant forum-shopping. Although venue and jurisdiction were technically proper in the present matter, petitioners' conduct subsequent to the original filing in Mississippi clearly demonstrates that that filing was subterfuge whose purpose was just as improper as that of a plaintiff who attempts to capture favorable law

by suing the defendant in a forum where personal jurisdiction does not exist.

III. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

The essence of petitioners' argument is that they have a right to utilize § 1404(a) to prosecute their personal injury claim in the jurisdiction where it arose, even though it would have been barred if originally filed in that jurisdiction. Respondent does not believe that this asserted right, if it exists at all, is of a magnitude sufficient to merit discretionary review by this Court. Furthermore, petitioners may yet recover against respondent in their breach of warranty action. Finally, petitioners may have, as others similarly situated to them frequently do, an avenue of recovery in the form of a legal malpractice claim against counsel who has allowed the statute of limitations to lapse without filing an action. Such conduct on the part of counsel is regarded as negligence per se in most jurisdictions and will generally result in prompt and substantial settlements being paid by professional liability insurance carriers.

CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

SHARLOCK, REPCHECK & MAHLER

BY: DAVID P. HELWIG, Esquire
Counsel of Record
GARY F. SHARLOCK, Esquire

SHARLOCK, REPCHECK & MAHLER
1110 Two Chatham Center
Pittsburgh, PA 15219
(412) 391-6171

Attorneys for John Deere Company a/k/a Deere & Company, Respondent